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Briefing Report to the Chairman,
Subcommittee on Superfund and
Environmental Oversight, Committee on
Environment and Public Works, U.S.
Senate

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SUPERFUND COMPLETED
31

Interim Assessment of EPA's Enforcement Program





United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division
B-226922

October 12, 1988

The Honorable Frank R. Lautenberg
Chairman, Subcommittee on Superfund and
Environmental Oversight
Committee on Environment and Public Works
United States Senate

Dear Mr. Chairman:

In your August 12, 1987, letter, you requested that we review the efficiency and effectiveness of the Environmental Protection Agency's (EPA) Superfund enforcement program. We agreed to concentrate on the following issues: (1) Is EPA using its enforcement tools to accomplish the goals and requirements of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980? (2) Can EPA do a better job of recovering cleanup costs from potentially responsible parties? (3) Does EPA have the necessary framework to plan, manage, and oversee the Superfund enforcement program?

On August 9 and October 7, 1988, we briefed your staff on the preliminary results of our review. At the briefings, we agreed to provide you with this interim report addressing the first two issues and to provide you with a final report on all three issues early next year.

As you know, EPA's Superfund program was authorized by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. This act gave EPA a broad mandate to clean up the nation's hazardous waste sites and to respond to emergency releases of hazardous substances. It makes all owners and operators of hazardous waste disposal facilities, as well as generators and certain transporters of hazardous wastes, liable for all cleanup costs.

To pay for cleanup until responsible parties can be located or when they are unable to pay, the 1980 law established a \$1.6 billion, 5-year trust fund. The law was supplemented by the Superfund Amendments and Reauthorization Act of 1986, which (1) reauthorized the Superfund program for 5 years, (2) increased the size of the trust fund to \$8.5 billion, and (3) provided new enforcement authorities (or tools) to ensure that those responsible for hazardous waste problems pay for their cleanup.

In summary, while EPA is taking enforcement actions under the Superfund program, it could make better use of available enforcement tools and more effectively recover cleanup costs. We found that

- the adequacy and timeliness of EPA searches for potentially responsible parties liable for site cleanup are continuing problems;
- the tracking and follow-up of information request letters used to further establish the liability of potentially responsible parties for a site have been inconsistent;
- reasons for not using unilateral administrative orders to compel responsible party cleanup of sites are not fully documented;
- special notice letters used to start negotiations for responsible party cleanups are not being issued on a timely basis; and
- efforts to recover Superfund monies used to clean up sites have been untimely and have been hampered by accounting system problems.

Sections 3 to 7 of the report contain more information on each of these problems. However, as you know, we are continuing our review, and our final report will contain a more comprehensive assessment, including recommendations as appropriate.

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We obtained the information for this report by reviewing enforcement activities in 3 of EPA's 10 regions and by speaking with EPA officials and others involved in the processing and related litigation of EPA enforcement actions. Details on our scope and methodology, including questions about the reliability of certain agency-supplied data, are contained in appendix I. We discussed our findings with EPA officials and incorporated their comments where appropriate. However, as you requested, we did not obtain official agency comments on a draft of this report.

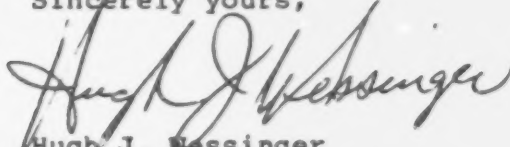
As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from its issue date. At that time, we will send copies to other interested congressional committees and members; the Administrator of EPA; the

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Director, Office of Management and Budget; and other interested parties.

If you have any questions on the material in this briefing report, please call me on 275-5489. Major contributors are listed in appendix II.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Hugh J. Wessinger". The signature is fluid and cursive, with the first name "Hugh" being particularly prominent.

Hugh J. Wessinger
Senior Associate Director

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ABBREVIATIONS

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980
EPA	Environmental Protection Agency
GAO	General Accounting Office
NPL	national priorities list
OSWER	Office of Solid Waste and Emergency Response
FRP	potentially responsible party
ROD	record of decision
SARA	Superfund Amendments and Reauthorization Act of 1986

SECTION 1

SUPERFUND CLEANUP AND ENFORCEMENT PROCESS

Thousands of waste disposal sites have been contaminated with hazardous substances that threaten the health and welfare of the nation and its environment. Yet, most sites remained untouched for many years. To address this problem, Congress created Superfund with the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.

CERCLA gave the federal government broad authority to respond directly to releases (or threatened releases) of hazardous substances and pollutants or contaminants that might endanger public health or the environment. It established a 5-year, \$1.6 billion Hazardous Substance Response Trust Fund program, financed primarily with a tax on crude oil and certain chemicals. CERCLA also enabled the federal government to recover the costs of any action from those responsible for the problem or to compel them to clean up the hazardous site at their own expense. By executive order, the President assigned the Environmental Protection Agency (EPA) the primary responsibility for running the Superfund program.

On October 17, 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA) of 1986. This new Superfund, among other things,

- reauthorized the program for 5 years;
- increased the size of the Trust Fund to \$8.5 billion;
- stressed permanent remedies and treatment or recycling technologies for cleaning up hazardous waste sites;
- set specific cleanup goals and standards; and
- provided new enforcement authorities (or tools) allowing EPA to ensure that those responsible for hazardous waste problems pay for their cleanup.

CLEANUP PROCESS

There are two basic types of Superfund-financed cleanups: removal actions and remedial actions. Removal actions are short-term responses to immediate and significant threats at any hazardous waste site but are not necessarily final solutions. Remedial actions are long-term efforts to mitigate or permanently eliminate conditions at hazardous waste sites. These remedial

actions are limited to those sites on the national priorities list (NPL).¹

To ensure that appropriate remedial cleanup actions are taken, EPA conducts a remedial investigation and a feasibility study for each site to identify the types and quantities of hazardous wastes present and to consider possible remedies. After completing the remedial investigation/feasibility study, EPA chooses a remedial alternative for implementation and incorporates it in a record of decision. Thereafter, the remedial alternative is refined and specified in the remedial design phase of the process. Once designed, a remedial action is taken to implement the chosen remedy.

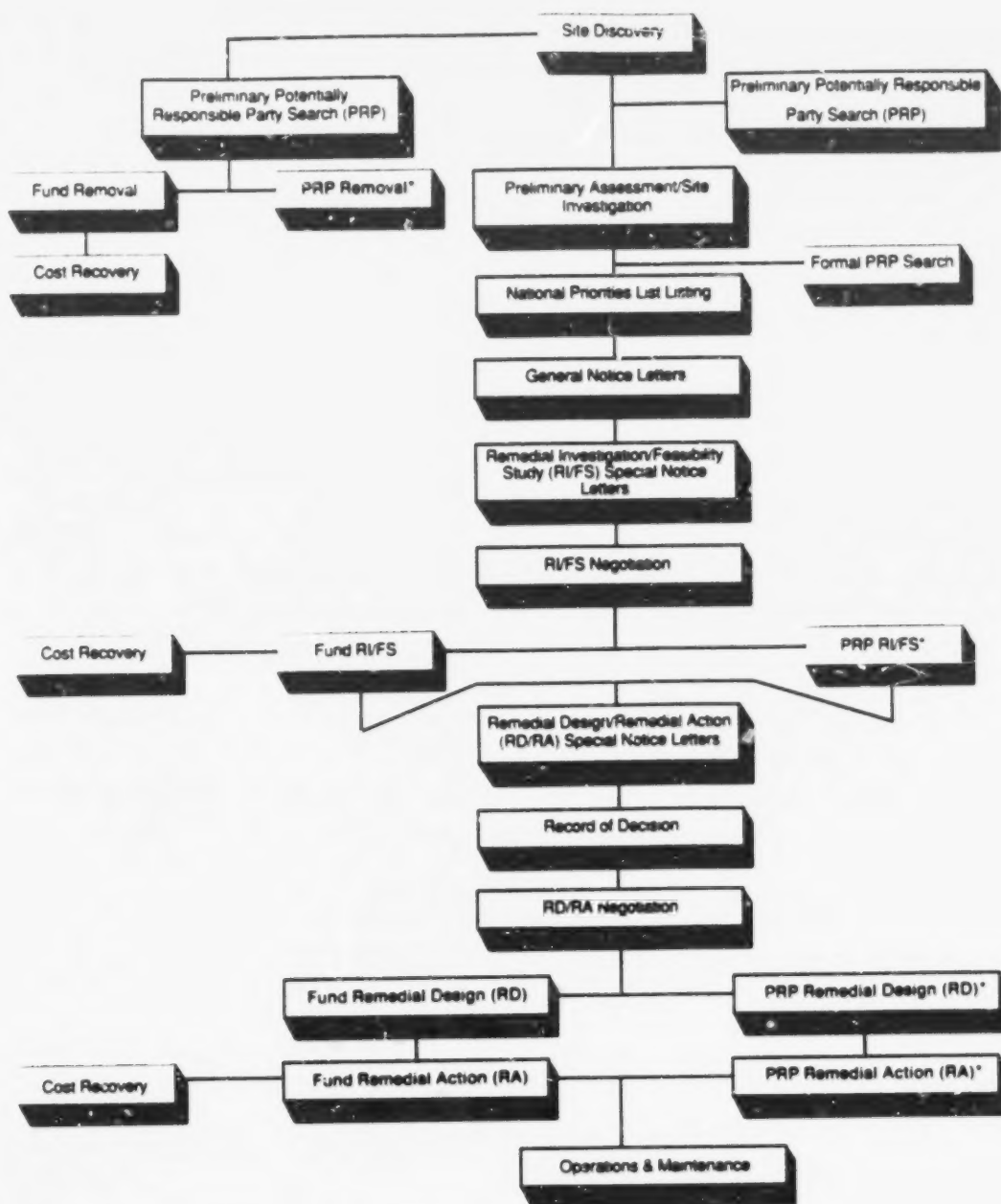
ENFORCEMENT PROCESS

Under Superfund, responsible parties are liable for either cleaning up hazardous waste sites themselves or reimbursing the government for expenses it incurs in cleaning up the sites. EPA uses its enforcement authority to identify, notify, and negotiate with responsible parties in an attempt to reach a settlement whereby responsible parties conduct or pay for cleanups. EPA may negotiate voluntary cleanups at different points in the cleanup process. EPA usually negotiates with the responsible parties (1) before the remedial investigation/feasibility study (in an attempt to get them to perform the study as well as carry out the selected remedy) or (2) after the study (in an attempt to get the parties to implement the selected remedy). In addition, EPA can seek a court order to require responsible parties to perform the cleanup themselves, or it may take action to require them to reimburse Superfund for the cost of removal and/or remedial actions.

Figure 1.1 shows an overview of the cleanup and enforcement process. The first step in the enforcement process begins after site discovery with a search for potentially responsible parties (PRP). While this search may extend over the entire life of a site's cleanup, EPA guidance suggests that a preliminary search to identify obvious PRPs should be conducted at the time of site discovery. This step is essential, especially at removal sites where immediate action is indicated, to determine whether PRPs are available to perform or finance the cleanup. EPA guidance also suggests that a formal search be conducted at the time a site is submitted by an EPA region to headquarters for inclusion on the NPL.

¹EPA ranks these sites according to the severity of the waste problem and places only the worst on its NPL. As of July 1988, this list contained 799 sites, with an additional 378 proposed for inclusion.

Figure 1.1: Superfund Cleanup and Enforcement Process



*EPA also seeks to recover its costs for the oversight of these activities.

During the search effort, EPA attempts to establish the liability and financial viability of those responsible for site cleanup. This may include individuals, corporations, or other entities that are past or present owners of sites, as well as generators or transporters that contributed hazardous substances to sites. To the extent that potentially liable PRPs are identified through this search effort, EPA informs the parties of their potential liability--through the use of general notice letters--and gives them an opportunity to conduct the site cleanup work. When parties are willing to undertake the work, EPA attempts to negotiate an agreement.

EPA may also issue a special notice letter, which triggers a moratorium on EPA's commencement of site cleanup. The purpose of the moratorium is to provide PRPs with a reasonable time period (opportunity) to reach agreement with EPA to conduct or finance cleanup activities.

Any negotiated agreement between EPA and PRPs is incorporated in an administrative consent order or consent decree. An administrative consent order is issued by EPA and agreed to by the responsible parties. While a consent decree also is agreed to by responsible parties, these decrees are referred to and approved by the Department of Justice and are entered in federal court. SARA requires all agreements for remedial action to be in the form of a consent decree.

There are generally three types of settlements. Under the first, the one most commonly used, PRPs agree to provide for a substantial portion, usually 100 percent, of cleanup costs. The other two types, both authorized by SARA, are mixed funding and de minimis settlements. Mixed funding occurs when monies from both Superfund and responsible parties are used at the same site. Use of mixed funding is most likely to be approved when the parties willing to settle are also willing to conduct the cleanup and when there are financially viable nonsettlers that EPA may pursue to recover Superfund's share of the cleanup costs. De minimis settlements involve parties that contributed very small amounts of low-toxicity hazardous waste to a site. At some Superfund sites, responsible parties number in the hundreds. To reduce the number of parties involved, EPA can settle with the small, or de minimis, contributors as a single group provided that the settlement involves a minor portion of the cleanup costs.

If EPA is unable to reach a negotiated agreement with the responsible parties, CERCLA, as amended, provides EPA the legal means to compel responsible parties to assume financial responsibility for the cleanup. Under section 106, EPA can unilaterally issue an administrative order to compel a responsible party to clean up a site where there may be an imminent and substantial threat to human health or the environment. If the order is violated, EPA can seek enforcement through the courts.

Under section 107, EPA may also use Superfund money for site cleanup and then recover the cost from PRPs through the courts. Under CERCLA, as amended, the courts can hold any PRP liable for complete cleanup costs.

SECTION 2

SUPERFUND ENFORCEMENT ACTIONS SINCE ENACTMENT OF SARA

Table 2.1 shows, as of March 1988, the number of EPA Superfund enforcement actions since SARA was enacted. EPA's initial goal was to have PRPs finance 50 percent of remedial designs and actions started, according to 1985 testimony by the EPA Administrator. In 1987, the Assistant Administrator for Solid Waste and Emergency Response was quoted as having said that this goal was 33 percent but that he hoped the number would rise to 50 percent. Since SARA was enacted, PRP-financed remedial designs and actions started have represented 27 percent and 34 percent, respectively, of total starts.

With respect to cost recovery, EPA's goal was to recover \$450 million by 1991. As of August 1988, EPA had recovered about \$97 million.

We are still obtaining data on EPA's use of its other enforcement tools, such as subpoenas, penalties, liens, and treble damages.¹ This information will be included in our final report.

¹Treble damages are punitive damages of up to three times the cost of a cleanup action for failure, without sufficient cause, to comply with an administrative order.

Table 2.1: Cleanup and Enforcement Actions Since Enactment of SARA
(as of March 1988)

<u>Activity^a</u>	<u>Aggregate number of actions</u>		<u>Percentage of actions PRP-financed</u>	<u>Total</u>
	<u>Fund-financed</u>	<u>PRP-financed</u>		
Removal starts	315	101	24	416
Removal completions	271	65	19	336
RI/FS first starts ^b	86	71	45	157
RD starts	95	35	27	130
RA starts	48	25	34	73
<u>Enforcement tools</u>				
Special notice letters				
For RI/FS				45
For RD/RA				41
Mixed funding				3
De minimis settlements				2
Unilateral administrative orders:				
For removals				27
For RD/RA				7
Referrals to the Department of Justice to compel a private party response				1
Total cost recovered (program to date) ^c				\$97 million

^aAbbreviations: RI, remedial investigation; FS, feasibility study; RD, remedial design; RA, remedial action.

^bAn RI/FS first start is the first plan initiated for a site to scope a permanent solution to the contamination problem.

^cThis represents the total cost recovered as of August 1988.

Source: EPA.

SECTION 3

ADEQUACY AND TIMELINESS OF PRP SEARCHES ARE CONTINUING PROBLEMS

The PRP search is the cornerstone of EPA's Superfund enforcement program. It supports EPA policy to secure cleanups by PRPs in lieu of using Superfund monies. Even when Superfund monies are used to finance the cleanup, a PRP search must be completed for cost recovery actions to be taken in the future. Despite the importance of PRP searches, their adequacy and timeliness continue to be problems. Consequently, EPA has hired at least one civil investigator for each of its 10 regions. In addition, according to EPA's civil investigator coordinator, the Agency is (1) auditing certain contracted PRP searches for compliance with Agency guidance; (2) interviewing regional officials regarding the adequacy of PRP searches; and (3) developing a national investigation search strategy that is due to be completed in October 1988.

ADEQUACY OF SEARCHES

Prior to the passage of SARA, EPA regional project managers conducted many PRP searches in-house. This resulted at times in insufficient search efforts, and therefore, EPA has supplemented or redone some searches using contractors.

EPA, however, has not developed any criteria to identify those pre-SARA searches that should be redone. Without these criteria, EPA has no assurance that all insufficient past searches are identified and redone. Such criteria are particularly important when large expenditures of Superfund monies are anticipated to clean up a site and when no liable and viable PRPs have been identified to date. One such instance involves three radium sites in EPA Region II.

According to EPA Region II information, radium processing waste generated at one Superfund site in New Jersey was disposed of there or transported to two other locations in New Jersey, where it was used as fill material at housing projects. These two locations also became Superfund sites. The projected cost to Superfund to clean up these three sites is about \$200 million. The PRP search, which was conducted by a regional project manager, has identified no liable and viable responsible parties to date.

At the time of our visit to Region II in June 1983, EPA had no plans to redo the PRP search for these three sites. An EPA headquarters official agreed that while a contracted search effort may not identify any liable and viable PRPs, it may be worth spending \$50,000 for such a search given the amount of Superfund monies involved.

Since SARA was enacted, EPA has used contractors to conduct most of its searches. According to one Superfund official, this has improved the thoroughness of searches overall, but he told us that the Agency is still not satisfied with the results achieved in all searches. He said that without Agency guidance on what type of individual should conduct the searches, some contracted searches are being performed by engineers and scientists who may lack the necessary investigative training and experience.

We randomly selected for review 65 of 216 contract searches initiated since SARA was enacted. (A minimum of five searches for each of EPA's 10 regions was included in our selection.) As shown in table 3.1, in only 17 of the 65 searches did EPA request the contractor to assign persons with specific expertise or experience to conduct the search. For the 17 searches, EPA usually requested a private investigator, but only 1 of the 17 requests went so far as to define the criteria for selecting the investigator. The criteria in this request included (1) familiarity with the local area, (2) length of time in the business, (3) previous experience, and (4) experience with environmental issues.

Table 3.1: Adequacy of Post-SARA Searches

<u>Region</u>	<u>Did search include a request for personnel with a particular expertise?</u>	
	<u>Yes</u>	<u>No</u>
I	3	8
II	6	3
III	3	3
IV	2	3
V	0	5
VI	0	6
VII	0	5
VIII	1	7
IX	1	4
X	1	4
Total	<u>17</u>	<u>48</u>

TIMING OF SEARCHES

While EPA guidance stipulates that PRP searches must be conducted adequately, it also specifies that searches must be conducted early enough so that EPA can identify the PRPs and compel their participation in the site cleanup. EPA guidance suggests that the search be completed by the time a site is proposed for inclusion on the NPL and well before any projected obligation of federal funds for a remedial investigation/ feasibility study.

About half of the searches we reviewed had not been completed in accordance with EPA guidance. Of the 65 searches we reviewed, 32 involved sites where either a remedial investigation/feasibility study or a remedial design/remedial action had begun before the search was completed. For 27 of the 32 searches, these activities had commenced since SARA's passage in 1986, indicating that the timing of PRP searches is a current problem.

EPA's civil investigator coordinator agreed that the timing of PRP searches has been a problem in the past and continues to be a problem, to some degree, in a couple of EPA regions. However, for sites proposed for inclusion on the NPL since the passage of SARA, he said that searches were being completed in a more timely fashion.

SECTION 4

TRACKING AND FOLLOW-UP OF INFORMATION REQUEST LETTERS HAVE BEEN INCONSISTENT

During the PRP search, information request letters can be sent to parties to obtain additional information on their involvement with the site. Documentation commonly requested, according to EPA guidance, includes details concerning waste operations and waste management practices, the types and amounts of substances contributed by each PRP, as well as the names of other PRPs that may have contributed substances to the site.

EPA allows parties receiving the information request letter to provide a response within a specified period, usually from 20 to 30 days. If a satisfactory response is not received, EPA policy recommends issuing a follow-up letter. If a satisfactory response to the follow-up letter is not received, further legal action--including an administrative order--may be used to compel an adequate response.

The information request letter is one of EPA's basic means of establishing PRP liability. Nevertheless, two of the three EPA regions we reviewed did not have a system to routinely track responses to these request letters. But more important, for those cases we reviewed, EPA had not always followed up on those parties that had failed to respond to EPA's information requests. At one Superfund site, rather than attempt to compel a response, EPA elected to fund the cleanup itself.

EPA Region II does not have a system to routinely track all information request letters mailed to PRPs. Thus, according to the chief of the regional Superfund site compliance branch, the region does not readily know how many information request letters it has mailed nor how many responses it has received. However, for sites having 50 or more PRPs, this official said that the region uses a contractor's computer system to track responses to the information request letter. The region provided us a computer print-out for three such sites.

While EPA Region II has tried to track responses to information requests at each of these three sites, we found that it has not done so effectively. For example, at one site, the print-out showed that EPA had sent out information requests to 235 parties between December 1983 and April 1988. Although about 120 days had elapsed since EPA sent its last batch of information requests, the print-out showed that EPA had received responses from only 64 of the 235 parties. The print-outs on the remaining two sites indicated that no responses had been received. However, a regional official told us that additional responses had been received but that the print-outs did not reflect this because

project managers are not required to enter response data into the system.

Without an adequate tracking system, EPA lacks assurance that it is appropriately following up on requests for which no response has been received. For example, the regional project manager for one site told us that EPA sent information request letters to the property owners and the suspected hauler of the hazardous waste in February 1985 and a follow-up letter again to the suspected hauler in July 1986. However, as of September 1988, none of the parties had responded to either request, and the region had not taken action to compel a response. In July 1988, the region funded an action to excavate soil at the site at an estimated cost of \$3.6 million.

According to the regional project manager, the region ultimately will seek to recover its cleanup cost from these PRPs. In our view, the likelihood of successful cost recovery is enhanced if the region attempts to compel PRPs to respond to the information request letters. More importantly, without follow-up and firm action, EPA loses the opportunity to get the PRPs to participate in a cleanup action, which would free up fund monies for other cleanups.

EPA Region II's deputy regional counsel agreed that cost recovery would be enhanced had the region done a better job of tracking information request letters. He also said that the region has an acute problem retaining Superfund personnel, resulting in the assignment of more than two regional project managers, on average, to each Superfund site. Considering this turnover, the official said it made even more sense to develop a system to track and follow up on information requests.

Region IX does not have a system to track all information requests, but like Region II, it uses a contractor to track requests for sites having a large number of PRPs.

In contrast to Regions II and IX, Region V has a system to track all information request letters. However, on the basis of the three cases we reviewed, this system is not complete, nor is it being updated on a regular basis. For example, we found that one of the cases had not been entered in the system. According to a regional official, all the parties on this case had adequately responded to EPA's initial requests, and therefore, no follow-up was necessary. In another case, regional officials said that responses had been received from all known PRPs to whom EPA sent information request letters and follow-up letters. However, we were not able to verify this because the Region V system had not been updated to reflect receipt of the responses.

SECTION 5

REASONS FOR NOT USING UNILATERAL ADMINISTRATIVE ORDERS ARE NOT FULLY DOCUMENTED

EPA's unilateral administrative order authority under section 106 of CERCLA, as amended, is one of the most potent administrative remedies available to the Agency under any existing environmental statute. It authorizes the issuance of an order to compel a PRP cleanup action upon a determination that there may be an imminent and substantial danger to the public health or welfare or to the environment because of an actual or threatened release of a hazardous substance from a facility. A fine not to exceed \$25,000 per day may also be imposed for willful violation of or failure or refusal to comply with a section 106 order. In addition, punitive damages up to three times the cost of cleanup of the site may be imposed for failure without sufficient cause to properly carry out a removal or remedial action pursuant to such an order.

EPA's criteria state that a unilateral administrative order should be used when

- PRPs have sufficient financial resources to comply with the order,
- a manageable number of PRPs exist,
- the nature of the required response action has been sufficiently identified, and
- EPA is ready to litigate the merits of the order to the extent necessary.

Despite the potency of these orders and the criteria for their use, EPA has not always documented why they weren't used to obtain a removal action by PRPs. At each of the three EPA regions (II, V, and IX) visited, we reviewed the action memorandums used to justify fund financing of 6 (18 in total) randomly selected removals. We found that 7 of the 18 memorandums, or about 40 percent, did not fully explain why the PRPs could not perform the removal or be compelled to do so by a unilateral order.¹ Instead, the memorandums cited reasons for federal financing such as (1) an agreement had not been reached with the PRPs on the best approach to mitigate the situation, (2) prompt action from the PRPs was not forthcoming, or (3) the PRPs had not submitted a timely response to

¹These seven included all the six fund-financed removals reviewed in Region II and one of six fund-financed removals reviewed in Region IX.

perform a prior removal action. The total removal cost approved by these seven action memorandums was \$2.6 million.

In discussing this situation, an EPA headquarter's official responsible for reviewing regional removal funding requests over \$2 million agreed that the reasons cited did not fully explain why PRP removal actions were not possible. On the basis of his experience, he said that regions tend to obscure, in their action memorandums, why PRPs can not undertake the removal action. He cited two reasons for this. First, regional performance is measured on the basis of total removal actions, not just those actions financed by PRPs. Consequently, there is no incentive for the regions to obtain more PRP removal actions. Second, overseeing PRP removal actions requires more personnel resources than federally financed removals. If more PRP removal actions are undertaken, fewer total removal starts and completions can occur because of the limited staff resources available.

The official said EPA is trying to encourage use of unilateral administrative orders by studying each region's resources and applications in promoting the issuance of the orders. The study will develop regional lists of removal sites with viable PRPs and recommend, for each, whether a unilateral administrative order is feasible. A report on this study is due to be completed by October 1988.

SECTION 6

SPECIAL NOTICE LETTERS TO OBTAIN PRP CLEANUP ARE NOT BEING ISSUED ON A TIMELY BASIS

Section 122 of SARA authorizes EPA to use special notice letters if it determines that a period of negotiations would facilitate an agreement with PRPs and would expedite site cleanup. The special notice letter creates a 60- to 120-day moratorium on EPA's conduct of the remedial action and provides PRPs with the opportunity to negotiate a settlement with EPA.

The timing of a special notice letter has a significant impact on both the success of the negotiations and EPA's ability to move forward with implementing a remedy without delay. Therefore, EPA has identified three stages when the regions may issue this letter. They are, from earliest to latest,

- prior to the release of the draft feasibility study and proposed cleanup plan for public comment,
- when the draft feasibility study and proposed cleanup plan are released for public comment, and
- when the record of decision (ROD) is signed.

As presented in table 6.1, EPA data show that the regions have generally been issuing special notice letters after the latest acceptable stage. Of 41 special notice letters issued for remedial design/remedial action between SARA's passage and March 1988, 18-- or 44 percent--were issued an average of 50 days before the ROD was signed. The remaining 23--or 56 percent--were issued an average of 174 days (about 6 months) after the ROD was signed. For each of the 23 cases, this represents an opportunity lost in beginning negotiations sooner and possibly moving forward in cleaning up the site. At the conclusion of our work in August 1988, an EPA headquarters official told us that the Agency was unsure how to achieve greater regional compliance with guidance on the timely issuance of special notice letters.

**Table 6.1: EPA Regional Use of Special Notice Letters Since
Enactment of SARA**

<u>Region</u>	<u>Number of special notice letters issued</u>		<u>Average number of days special notice letters were issued</u>	
	<u>Before ROD</u>	<u>After ROD</u>	<u>Before ROD</u>	<u>After ROD</u>
I	0	1	0	173
II	1	10	34	258
III	2	1	20	427
IV	2	3	61	93
V	9	0	50	0
VI	0	3	0	21
VII	1	1	182	185
VIII	1	0	29	0
IX	1	2	18	91
X	<u>1</u>	<u>2</u>	<u>26</u>	<u>58</u>
Total	<u>18</u>	<u>23</u>	<u>50</u>	<u>174</u>

SECTION 7

COST RECOVERY EFFORTS LIMITED BY ACCOUNTING SYSTEM PROBLEMS AND UNTIMELY COST RECOVERY

EPA is falling behind in its efforts to recover Superfund costs, and it expects to fall short of its long-term cost recovery goal. There are a number of contributing factors. First, EPA has not identified and allocated to sites millions of dollars in indirect costs. Thus, EPA's ability to recover these costs is limited. Secondly, EPA has not taken timely action to pursue cost recovery cases. More timely actions could help EPA meet its goal and could produce additional revenues through the collection of interest. EPA recognizes these problems and has taken some actions to correct them.

STATUS OF COST RECOVERY

EPA data presented in figure 7.1 show that the Agency is falling behind in its efforts to recover Superfund costs. As of March 1987, EPA had recovered \$45 million. At that time, this represented 2.5 percent of the \$1.8 billion in Superfund obligations and 9.8 percent of the \$460 million in recoverable costs. By comparison, the \$97 million recovered by EPA through August 1988 represents 2.7 percent of \$3.6 billion in Superfund obligations but only 6.5 percent of \$1.5 billion in recoverable costs. Thus, between March 1987 and August 1988, EPA cost recovery, as a percentage of recoverable costs, has dropped 3.3 percentage points, from 9.8 percent to 6.5 percent.

Figure 7.1: Status of Cost Recovery



Source: Based on data from EPA.

The \$97 million that EPA has recovered represents only 22 percent of EPA's goal to recover \$450 million by 1991. Although we found no EPA information documenting this goal, an official in the Office of Solid Waste and Emergency Response (OSWER)--the office that manages the Superfund program--acknowledged that the goal exists. This official also acknowledged that EPA does not expect to reach the 1991 goal and that no new goals have been established. Factors affecting EPA's ability to reach its cost recovery goal and EPA actions to improve cost recovery efforts are discussed below.

ALLOCATION OF INDIRECT COSTS

To date, EPA's indirect cost method has not identified and properly allocated all Superfund recoverable costs, thus limiting the Agency's ability to recover all its costs. Although EPA's position is that all Superfund costs should be assigned to a Superfund site, the Agency recognizes that its current indirect cost method does not account for \$378 million in indirect costs. According to Agency documentation, these costs include preliminary assessments on potential Superfund sites, non-site equipment, and Superfund research and development.

In recognition of this problem, EPA is developing a new system to more fully account for indirect costs. The Agency expects this system to be operating by the end of January 1989 at the earliest. However, this may be too late to recover past indirect costs amounting to \$378 million.

EPA HAS NOT TAKEN TIMELY COST RECOVERY ACTION

EPA guidance does not give a specific timetable for the early issuance of demand letters. (These letters formally ask PRPs for cleanup funds and initiate the accrual of interest charges to PRPs on funds spent by EPA). However, EPA guidance does state that cost recovery actions (which EPA defines as cost recovery referrals to headquarters) should be initiated no later than 1 year after a removal completion and 18 months after the signing of the ROD for remedial actions.¹

Using these criteria, EPA Regions II, V, and IX identified for us 98 cases for which cost recovery actions should begin no later

¹Cost recovery action can be initiated during the latter phase of construction of the remedial action if the construction is expected to take more than 2 years after the ROD is signed.

than March 31, 1988.² After discussing these cases with regional officials, we determined that only 47 of the cases had viable PRPs and, therefore, were eligible for cost recovery. Table 7.1 shows that in 27 (57%) of these 47 cases, EPA did not issue a demand for payment and that in 6 other cases (13%), demands for payment were not issued in a timely manner. Thus, as of August 31, 1988, EPA did not issue or was late in issuing a demand for payment in 33 (70%) of the 47 eligible cost recovery cases we reviewed.

²According to EPA Regions II, V, and IX, these 98 cases represented all fund-financed removals completed between February 1, 1986, and March 31, 1987, and all RODs signed between August 1, 1985, and September 30, 1986.

Table 7.1: Cost Recovery Not Initiated or Initiated Late

<u>Case analysis</u>	<u>Number of cases</u>			
	<u>Region II</u>	<u>Region V</u>	<u>Region IX</u>	<u>Total</u>
Cases reviewed	43	43	12	98
Cases eligible for cost recovery	16	23	8	47
Cases in which demand for payment was not issued ^a	11	10	6	27
Cases in which demand for payment was untimely	0	6	0	6
Percentage of nonissuance or untimely issuance cases	69%	70%	75%	70%

^aDemands for payment were not issued as of August 31, 1988.

More timely actions in 70% of the cases we reviewed could have helped EPA meet its cost recovery goal by providing earlier collection and accrual of interest on the funds expended. These lost dollars represent funds that could have been used for future cleanups. (We will include an estimate of the lost interest in our final report.)

EPA ACTIONS TO IMPROVE COST RECOVERY

EPA officials in OSWER acknowledged that a backlog of cost recovery cases exists, and EPA officials in two of the three regions we reviewed (V and IX) said that cost recovery was not being undertaken at sites because they were low priorities. Additionally, two of the three regions in our review (regions II and IX) did not have full-time cost recovery staff, although officials in all three regions stated that they were seeking additional staff. One OSWER official stated that current resources are adequate for addressing the national cost recovery strategy (which is to maximize returns to Superfund) but added that additional resources would help EPA to cover more sites.

EPA is trying to improve its use of existing resources by better identifying the universe of sites from which EPA has the potential to recover costs. To do this, EPA is directing its regional offices to review and revise cost recovery data on individual sites. The universe will include a list of remedial actions, remedial investigation/feasibility studies, and removals that are suitable for cost recovery action. Sites with completed

or ongoing cost recovery actions, no viable PRPs, questionable evidence, or a questionable legal case will be excluded from the listing. EPA plans to use this information to better target sites for cost recovery actions in the remainder of fiscal year 1988 and in 1989.

Additionally, on July 29, 1988, EPA issued a new cost recovery strategy that established the following categories (in order of priority):

- sites where remedial actions have been initiated;
- NPL or non-NPL sites³ with completed removal actions or remedial investigation/feasibility studies of \$200,000 or greater and with possible statute of limitation deadlines approaching;⁴
- sites with completed removal actions that meet the above criteria but have no statute of limitation deadlines approaching;
- sites with partial settlements and viable nonsettlers; and
- sites with total cleanup costs under \$200,000.

Although EPA has instituted new criteria to rank cost recovery sites, the Agency may not maximize returns to the Superfund program unless the current case backlog is reduced. For example, as the Superfund program matures and more cases get closer to their statute of limitation deadlines, EPA's cost recovery strategy would make these cases priorities. Thus, higher-dollar cases that would maximize returns to the Fund could be neglected.

In addition to developing a new cost recovery strategy, EPA has recently proposed regulations on the use of alternative dispute resolution (binding arbitration) to facilitate the handling of cost recovery cases with total cleanup costs not exceeding \$500,000, excluding interest. How this regulation will affect the backlog of cases is unknown.

³Hazardous waste sites not on the NPL are generally left to the states to clean up. However, CERCLA allows EPA to pay for removals at non-NPL sites (with the exception of federal facilities).

⁴If there are competing demands between cases in the first and second categories, cases in the second category take precedence.

OBJECTIVES, SCOPE, AND METHODOLOGY

Our objectives for this report were to review two issues: (1) Is EPA using its enforcement tools to accomplish the goals and requirements of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980? (2) Can EPA do a better job of recovering cleanup costs from potentially responsible parties?

We performed our work at EPA headquarters in Washington, D.C., and EPA Regions II (New York, New York), V (Chicago, Illinois), and IX (San Francisco, California). These regions were selected from EPA's 10 regions because they are geographically dispersed and because they rank among the top 5 regions having the greatest number of sites on the Superfund national priorities list.

We obtained information on EPA's Superfund enforcement program by reviewing, in particular, site enforcement activities in EPA Regions II, V, and IX between February 1987 and March 1988. We specifically evaluated (1) negotiations seeking responsible party participation in remedial investigation/feasibility studies and remedial design/remedial actions; (2) enforcement tools used to facilitate negotiations or used when negotiations failed; and (3) efforts to achieve cost recovery when Superfund Trust Fund money was used in lieu of money from responsible parties.

We relied on data from EPA's Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) and from EPA Region II, V, and IX systems to identify site enforcement activities for review. EPA personnel cautioned us about the developmental status of the CERCLIS system and expressed concerns regarding the validity of the system's present data. However, these EPA personnel also advised us that the CERCLIS system contained the best available data; thus, we saw no alternative to its use.

We obtained specific information regarding site enforcement activities by interviewing EPA regional project managers responsible for monitoring the applicable Superfund sites as well as EPA attorneys responsible for reaching settlement with the responsible parties. We also reviewed regional files on selected Superfund sites to determine the basis for decisions regarding certain site enforcement activities.

We conducted our review between October 1987 and August 1988 in accordance with generally accepted government auditing standards. As part of that review, we examined the internal controls for ensuring the effectiveness and efficiency of the

APPENDIX I

APPENDIX I

Superfund enforcement program. Our final report will comment on the adequacy of those controls.

In keeping with the chairman's request, we did not ask EPA to officially review and comment on this briefing report. Instead, we sought the views of EPA officials responsible for Superfund activities and incorporated their views in the report where appropriate.

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